No. 2846

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and and Testament of JOHN ROSENFELD, Deceased,

Plaintiff in Error.

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff in Error.

Filed this..................................day of October, 1916.

FRANK D. MONCKTON, Clerk.

By..., Deputy Clerk.

Filed
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F. D. Monckton,
Clerk.

BENAS & GILHOOLY, 509 SANSOME ST.

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ALPHABETICAL INDEX OF AUTHORITIES

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Statement of the Case.

The questions presented in this case are of law. The facts are either conceded or undisputed by the defendant in error. The case was tried by the Court sitting without a jury, a trial by jury having been waived in writing. (See Bill of Exceptions; Transcript of Record, p. 42.)

The leading propsition involved, under the assignment of errors, is whether, under the terms of the last will and testament of John Rosenfeld, deceased, the "*value* of the *rights* to receive the *annual income*" from certain *contingent* legacies for the period of *eleven years* (that being the duration of the trust provided for by the will), was the equivalent, for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented, of the "*value* of the *rights* to receive the annual income" *for life,* said income to be computed with the aid of mortuary tables.

Plaintiff in error contends that, inasmuch as the principal or corpus of the legacies left by the will of John Rosenfeld was contingent and not vested, and as the trust created by the will of John Rosenfeld was to continue for *eleven years,* the interest of each beneficiary, which was subject to a tax, was the "value of the rights to receive the *annual income*" for the definite term of *eleven years;* not for *life,* as was held by the Court below.

Defendant in error, on the other hand, contends that the interest of each beneficiary, which was subject to a tax, was the "*value* of the *rights* to receive the *annual income*" *for life,* because "the beneficiaries would have and enjoy the income not only *during the trust,* but thereafter *during their lives.*" (See opinion of Court below, Transcript of Record, p. 60.)

The trial Court upheld the contention of the defendant in error and held that the "*value* of the *rights* to receive the annual income" for *eleven years* should, in effect, be treated as the right to receive the annual income *for life*, and that the defendant in error was entitled to retain the sum of $2,480.71 as taxes assessed on that basis, and gave judgment for plaintiff in error for the difference between $2,480.71 and the amount of taxes actually paid by them less a tax of $150.00 not here in controversy. Instead of giving judgment in favor of plaintiff in error in the sum of $2,998.80 with interest and costs as prayed for in the amended complaint, the Court below rendered judgment in favor of plaintiff in error in the sum of $1,432.19 with interest and costs, the defendant in error conceding, under the theory of the contention advanced by him, that the plaintiff in error was entitled to that sum at all events.

Therefore, while plaintiff in error succeeded in recovering judgment in the Court below, he did not recover the full sum of $2,998.80 with interest and costs, that being the amount claimed in the amended complaint.

Feeling dissatisfied with the judgment of the lower Court in that and other respects, to be pointed out hereafter, the plaintiff in error sued out this writ of error.

This case was before this Appellate Tribunal on a previous occasion. It was consolidated, for the purposes of hearing before this Court, with four other cases involving similar questions, as to whether the legacies involved in the respective cases were contingent or vested legacies within the meaning of the War Revenue Act of June 13, 1898, c. 448, sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, sec. 10, 31, Stat. 946 (U. S. Comp. St. 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983).

It was then held by this Court that the legacies bequeathed under the last will and testament of John Rosenfeld, deceased, were contingent, and not vested legacies and that said legacies had not vested previous to the repeal of the War Revenue Act of June 13, 1898, as amended, which took effect on July 1, 1902, and that the then Collector of Internal Revenue had no right to impose and collect taxes of $652.15 on each of the six legacies upon the theory that the legacies had vested previous to the repeal of the law.

> *See Muenter* vs. *Union Trust Co. et al.* and companion cases, 195 Fed. Rep. 480.

But, while holding that the legacies were contingent and therefore not subject to taxation, and affirming the decision of the lower Court to that extent, this Court held, nevertheless, that a tax should have been imposed, assessed and collected "*upon the value of the rights to receive the annual income as determined in United States* vs. *Fidelity Trust Company*" (222 U. S. 158, 32 Sup. Ct. 59), such value to be ascertained with the "*aid of the mortuary tables.*"

This case and another case were thereupon remanded to the lower Court, "with leave to the parties to amend their pleadings and for further proceedings."

The complaint in the case at bar was amended to conform to the ruling of this Court. Instead of asking for a judgment of $4,062.90, as demanded in the original complaint, the amended complaint prayed for a judgment in the sum of $2,998.80 with interest and costs. The case was retried, with the result, as above stated, that the plaintiff in error was awarded judgment in the sum of $1,432.19 with interest and costs instead of the sum, as prayed for in the amended complaint, of $2,998.80 with interest and costs, which latter sum was the amount he then considered he was entitled to under the views enunciated and the law as declared by this Court in its opinion rendered in this case upon the writ of error previously sued out.

It is to a wrong conception, by the learned trial Judge, of the decision of this Court as declared in the case of *Muenter* vs. *Union Trust Co. et al.*, that we attribute the adverse rulings and judgment of the Court below upon the retrial.

The syllabus of the decision of this Court, upon the previous writ of error, as reported in 195 Fed. Rep. 480, is as follows:

> "A legacy in trust to a trustee, who is to pay the net income to the legatee for a *term of years* until distribution, creates a vested in-

terest in the beneficiary in such income *for the term,* which is assessable under War Revenue Act June 13, 1898, c. 448, sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, sec. 10, 31 Stat. 946 (U. S. Comp. St., 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), if it became vested before July 1, 1902, and amounted to $10,-000.00."

This Court said, as to the facts of the case at bar, as follows:

"In the third case, *Muenter* vs. *Rosenfeld*, the testator, John Rosenfeld, died on May 28, 1902, leaving a will which was duly probated, under which his estate was distributed. There were six legacies of $57,969.55 each, to be held in trust, the income thereof to be paid to the beneficiaries for the *period of eleven years, provided some one of the children and beneficiaries therein named should so long survive, otherwise the trusts to terminate upon the death of the last surviving of the said children and beneficiaries.* The trust expires on May 28, 1913."

We quote at length from the opinion of this Court, inasmuch as it announced the law of the case:

"The question presented in the Court below was whether the personal property and legacies left under the terms of the respective wills to trustees, in trust for the respective beneficiaries, were contingent beneficial interests. or whether the property in each case vested absolutely in possession or enjoyment, and thereby became subject to the tax within the meaning of Act Cong. June 13, 1898, 30 Stat.

448, as amended by Act March 2, 1901, 31 Stat. 946, and supplemented by Act June 27, 1902, 32 Stat. 406, and as affected by Act April 12, 1902, c. 500, 32 Stat. 96 (U. S. Comp. St. Supp. 1911, p. 978), repealing the former acts, the repeal to take effect on July 1, 1902.

"In each case the legacies had been assessed for the gross amount thereof and the taxes had been paid under protest, and in each case the action had been brought by the respective defendants in error to recover the amount so paid on the ground that the tax had been unlawfully imposed and collected. The Court below held that the legacies were contingent beneficial interests and not vested, and rendered judgments for the defendants in error on the authority of *Vanderbilt* vs. *Eidman,* 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and the decision of this Court in *Lynch* vs. *Union Trust Co.,* 164 Fed. 161, 90 C. C. A. 147, and other cases. The legacies having been assessed in gross and upon the theory that the interests were vested, the decision in *Vanderbilt* vs. *Eidman* was deemed applicable. But in the recent case of *United States* vs. *Fidelity Trust Co.,* 222 U. S. 158, 32 Sup. Ct. 59, L. Ed.—, decided December 4, 1911, it was held that a legacy of property in trust to a trustee who was to pay the net income to the legatee in periodical payments during the latter's life is not a contingent interest, but a vested estate for life, and that it was assessable under the War Revenue Act of June 13, 1898, upon its value as ascertained with the aid of mortuary tables. On principle we think there can be no distinction between the estate of the beneficiary of such income of a legacy for life and that of the beneficiary of such income for a term of years, and on the authority of the decision last cited we must hold that in the case of *Muenter* vs. *Union*

Trust Co., and the case of *Muenter* vs. *Rosenfeld,* the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co., supra.* A complication arises from the fact that the defendants in error in framing the issues, relying as they did upon the proposition that the legacies were contingent, and not vested, and had been assessed at their gross value as if vested, did not question the assessments on the ground that the legacies had been overvalued, but, on the contrary, expressly acquiesced in the estimate 'for the purposes of this action.' We think they should not be precluded by those admissions from availing themselves of their just defenses to the assessments * * * The cases are remanded to the District Court, with leave to the parties to amend their pleadings and for further proceedings." (195 Fed. Rep. 480.)

John Rosenfeld died on May 28, 1902, leaving personal property in California. The repeal of the War Revenue Act took effect July 1, 1902, or 32 days after he died.

By his will, John Rosenfeld left certain legacies, six of which are involved in the present suit. After making certain bequests, not involved in case at bar, he created a trust for certain uses and purposes to last for *eleven years* from his death.

The will provided:

> "The said trust shall continue in existence for the period of eleven (11) years after my death, provided some one of my children herein named shall so long survive, otherwise the trust shall terminate upon the death of the last surviving of my said children."

The six legacies above referred to were assessed by the then Collector of Internal Revenue upon the theory that they had vested previous to the repeal of the War Revenue Act of June 13, 1898, which took effect on July 1, 1902, and each legacy was assessed at the clear value of $57,969.55, as follows:

(1) Legacy left in trust for Henrietta Rosner, a daughter...... $57,969.55;

(2) Legacy left in trust for Sarah Epstein, a daughter.................. $57,969.55;

(3) Legacy left in trust for Lucy I. Weill, a daughter................ $57,969.55;

(4) Legacy left in trust for Max S. Rosenfeld, a son.................. $57,969.55;

(5) Legacy left in trust for Louis Rosenfeld, a son.......................... $57,969.55;

(6) Legacy left in trust for Henry Rosenfeld, a son.......................... $57,969.55;

There is no dispute as to this assessed value of each legacy by the then Collector of Internal Revenue.

The then Collector of Internal Revenue imposed a tax on each one of these legacies of $652.15 upon the theory, as stated, that the legacies had vested in possession and enjoyment of the beneficiaries prior to the repeal of the law on July 1, 1902.

The sum of $652.15 was the tax on each one of the six legacies of $57,969.55, being at the rate of $1.12½ for each $100.00 of $57,969.55, $1.12½ being the rate of tax, under the law, to a legatee of lineal issue where the legacy exceeded the sum of $25,-000.00. Under the previous decision of this Court, affirming the judgment of the lower Court to that extent, the Collector of Internal Revenue had no right to assess, impose and collect the sum of $652.52 on each one of the six legacies left to the six beneficiaries above enumerated, for the reason that none of said legacies had vested in possession or enjoyment previous to the repeal of the law which took effect on July 1, 1902. But this Court further held, in its previous decision of this case, that the Collector of Internal Revenue should have assessed, imposed and collected a tax, not on the gross amount of the legacies, but on the "*value* of the *rights* to receive the *annual income* as determined in *United States* v. *Fidelity Trust Company*," such value to be ascertained "with the aid of mortuary tables," and this case and another case were remanded to the Court below, "with leave to the parties to amend their pleadings and for further proceedings."

The complaint was accordingly amended to conform to the views of this Court and judgment prayed in the sum of $2,998.80 instead of $4,062.90, as demanded in the original complaint.

This sum of $2,998.80 is arrived at as follows: The gross or clear value of each one of the legacies left to each one of the six beneficiaries was the sum of $57,969.55. According to the official mortuary tables (see same as contained in "Compilation of Decisions," rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898, edition of January, 1899, pp. 195 to 199; also see the tables printed on the back of the "Legacy Return," Plaintiff's Exhibit No. 3 on retrial) the *"value* of the *rights* to receive the *annual income"* from the sum of $57,969.55, assuming money at four per cent in accordance with the official mortuary tables *for the period of eleven years,* would amount to $20,313.62.

In other words, according to the decision of this Court rendered on the previous writ of error, the Collector of Internal Revenue, as testified to by Frank H. Driscoll, the Internal Revenue official, should have assessed the clear *"value* of the *rights* to receive the *annual income"* derived from the sum of $57,969.55 at the sum of $20,313.62. He, therefore, should have assessed, imposed and collected a tax on the sum of $20,313.62, and not on the sum of $57,969.55, the latter being the gross or clear value of each legacy. (See testimony of Frank H. Driscoll, Transcript of Rec., pp. 47-49.)

The tax on $20,313.62 would, to a legatee of lineal issue, and being under the sum of $25,000.00, at the rate of 75 cents for each and every $100 of the $20,313.62, amount to $152.35.

In other words, each one of the six legatees or beneficiaries should have been assessed with a tax of $152.35 instead of $652.15, which was the amount they actually had to pay; and therefore, by virtue of the complaint as amended, judgment was asked for the difference between $652.15 and $152.35, or the sum of $499.80 as to each one of the six legacies, which aggregate the total sum of $2,998.80, the amount sued for under the complaint as amended.

Under the contention of counsel for defendant in error, which was sustained by the lower Court, if the "*value* of the *rights* to receive the *annual income*" are treated as *life estates* or *incomes for life,* the tax on each interest of each beneficiary computed "with the aid of mortuary tables" would be as follows:

"San Francisco, Cal., April 8, 1914. The Honorable, the United States District Court, San Francisco, California—Sir: The following data, the result of computation of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 20, 1902, in income from the sum of $57,969.55, at 4 per cent, $2,318.782, are submitted:

To Henrietta Rosener, daughter, born May 4, 1860; age 42 years; amount taxable, $33,903.42; rate $1.12½; tax	$ 381.41
To Sarah Epstein, daughter; born June 2, 1861; age 40 years; amount taxable, $34,997.25; rate $1.12½; tax	393.72
To Louis Rosenfeld, son; born June 16, 1863; age 32 years; amount taxable, $36,020.45; rate $1.12½; tax	405.23

To Henry Rosenfeld, son; born June 22, 1865; age 36 years; amount taxable, \$36,978.89; rate \$1.12½; tax	416.01
To Lucy I. Weill, daughter, born August 16, 1869; age 32 years; amount taxable, \$38,720.09; rate \$1.12½; tax	435.60
To Max L. Rosenfeld, son; born May 8, 1873; age 29 years; amount taxable, \$39,882.27; rate \$1.12½; tax	448.74
Total tax	\$2,480.71

"In computing the foregoing the annuity, or present value of one dollar due at the end of each year during the life of a person of specified age was, as to each, as follows:

"Henrietta Rosener, 42 years, \$14,621.22; Sarah Epstein, 40 years, \$15,092.95; Louis Rosenfeld, 38 years, \$15,534.21; Henry Rosenfeld, 36 years, \$15,947.55; Lucy I. Weill, 32 years, \$16,698.46; Max L. Rosenfeld, 29 years, \$17,-202.25.

"Respectfully submitted,

F. H. Driscoll."

(See testimony of Frank H. Driscoll, Internal Revenue officer, Transcript of Record, pp. 53-55.)

Treating the taxable interest of each beneficiary to the annual income as a life estate or income for life, under the above computation, the defendant in error would be entitled to the aggregate tax of \$2,480.71.

The amount of taxes actually paid by the plaintiff in error was $4,062.90, which included a tax of $150.00 on a legacy to Margitta Fisher, not considered then in controversy. The tax on the legacies here in question was, therefore, $3,912.90. Deducting the total tax of $2,487.71, under the view that the taxable interest of each beneficiary was a *life estate* or *income for life,* as was held by the lower Court, from $3,912.90, would leave $1,432.19, in which amount the Court below awarded judgment in favor of plaintiff in error.

The defendant in error introduced no testimony whatever. He relied upon two defenses, as follows:

First: That the tax should be computed on the income to each legacy just as if each legatee had been left a *"life estate"* by the terms of the will, instead of the period of *eleven years,* which is the time specifically provided for in the will.

The Court below, as stated, upheld this contention of the defendant in error, and it is to this erroneous view of the law that our writ of error is chiefly addressed.

The second ground of defense was:

That this action is governed by section 3226 and other sections of the Revised Statutes, providing a certain course of procedure to obtain a refund of taxes erroneously or illegally assessed or collected before suit can be maintained for the recovery of such taxes, counsel for the defendant in error contending that such course had not been strictly pursued in this case.

The Court below rejected this view of the law as contended by counsel for defendant in error. (See opinion, Transcript of Record, pp. 56-60.)

It is to be noticed that defendant in error has acquiesced in this view of the law and has not sued out a writ of error.

ARGUMENT.

The assignment of errors directly raises the proposition whether the annual income for the period of ELEVEN YEARS, in law and for the purposes of taxation, should be treated and considered as an annual income FOR LIFE.

(See Assignment of Errors Nos. I-XI, Transcript of Record, pp. 63-70.)

The rulings of the trial Court, involving the above proposition, arose upon the offer of evidence on the part of both plaintiff in error and defendant in error.

(See Assignment of errors Nos. VII, VIII, and IX, Transcript of Record, pp. 65-69.)

While the Court, at the trial, reserved its final rulings upon the admission or rejection of the evidence of the Internal Revenue officer, Frank H. Driscoll, which directly raise the proposition above referred to, the Court subsequently allowed both sides the benefit of any and all exceptions to such adverse rulings.

(See Bill of Exceptions, Transcript of Record, pp. 48, 49, 50, 51, 53, 61.)

In determining the above proposition, there are two cardinal rules of interpretation that should constantly be kept in mind.

First: In a case of doubt or of ambiguity, "statutes imposing taxes are construed most strongly against the Government and in favor of citizens or subjects, and that such statutes are not to be liberally construed."

> *Eidman* vs. *Martinez,* 184 U. S. 878;
> *Lynch* vs. *Union Trust Co.,* 164 Fed. 161, *163*;
> *Disston* vs. *McLain,* 147 Fed. 114, *116-117.*

In the case of *Lynch* vs. *Union Trust Company, supra,* this Court, speaking through District Judge Van Fleet, said:

> "Primarily in this connection it is necessary to keep in view a cardinal principle, to be applied generally to the interpretation of legislation whereby the government seeks to impose a duty or burden upon the property or rights of the citizen in the nature of taxation, and more especially applicable to statutes such as this, seeking to impose a burden of a special or unusual character, and that is that, in all cases of doubt or ambiguity arising on the terms of such a statute, every intendment is to be indulged against the taxing power. This principle has been aptly stated in two cases involving the application of the statute under consideration: *Eidman* vs. *Martinez,* 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697; *Disston* vs. *McLain,* 147 Fed. 114, 116, 77 C. C. A. 340."

Second: The practice of officials connected with any of the executive departments of the Government in applying certain laws and imposing taxes thereunder, while not controlling on this Honorable Court, yet is persuasive as to the views of these public officials in their practical application of the law.

As was well said by the Supreme Court of the United States in the case of *U. S.* vs. *Ala. R. R. Co.,* 142 U. S. 615-616, *622*:

> "We think the contemporaneous construction thus given by the executive department of the Government * * * a construction which, though inconsistent with the literalism of the Act, certainly comports with the equities of the case, should be considered as decisive in this suit."

And, again, the Supreme Court of the United States in the case of *U. S.* vs. *Finnell,* 185 U. S. *244,* 46 L. Ed. 890, *893*:

> "Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the Court to so adjudge. * * * But if there simply be doubt as to the soundness of that construction * * * the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons."

In the case of *New York* vs. *New York City R. Co.,* 193 N. Y. 543, 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, is entitled to great influence.

See, also, statement of the rule and cases collated in Vol. 36 Cyc., pp. 1139-1142.

In the case at bar, the Internal Revenue Officer treated the "*value* of the *rights* to receive the *annual income*" for *eleven years,* the period of the trust, as the equivalent of an annuity for *eleven years,* and not, as was held by the Court below, as an income *for life.* (See testimony of Frank H. Driscoll, Internal Revenue Officer, Transcript of Record, pp. 48-49.)

Section 29 of the Act of June 13, 1898, c. 448 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), so far as pertinent to the question here involved, is as follows:

> "That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, etc."

This section was repealed, to take effect July 1, 1902 (Act April 12, 1902, c. 500, Sec. 7, 32 Stat. p. 97 (U. S. Comp. St. Supp. 1907, p. 649), but all taxes or duties imposed thereby and the amendment thereto, prior to the taking effect of the repeal, were reserved from the operation thereof.

Subsequently, on June 27, 1902 (Act June 27, 1902, c. 1160, Sec. 3, 32 Stat. 406 (U. S. Comp., St. Supp. 1907, p. 652)), Congress passed an act, commonly known as the "Refunding Act," which authorized and directed the refunding by the Secretary of the Treasury, upon proper application, of all such taxes, "as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two," and provided that no tax should *thereafter* be assessed or imposed, under said war revenue act, *"upon or in respect to any contingent beneficial interest which shall not become vested in possession or enjoyment prior to said July first, nineteen hundred and two."* This was the state of the legislation at the time the present action arose.

We now take up a discussion of the ultimate question presented to this Court for decision.

Is the right to receive the annual income for eleven years the same thing, in law and for the purposes of taxation, as the right to receive an annual income for life?

The learned Judge of the Court below held that it was. In his written opinion, he based this decision upon the following reasoning:

> "The will of Rosenfeld creating a trust to continue for *eleven years,* during which period the beneficiaries were to receive the annual income, and at its expiration the principal or corpus of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the in-

> come for the definite *term of eleven years;* defendant, on the other hand, contending that the vested interests of each was to the income *for life,* since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. *The latter is, I think, the correct construction.* It is not a case where, at the termination of the trust period, the right to receive the income might, on the happening of some contingency, pass to some one other than the beneficiary, but where, by the vesting of the corpus of the legacy at the termination of that period the right to the income would still remain for life." (Italics ours.)

It is significant that no authorities are cited by the learned Judge of the Court below in support of his views; nor does counsel for defendant in error produce any. We will, on the other hand, refer to a number of authorities from the U. S. Supreme Court and Circuit Court of Appeals, which will clearly establish the erroneousness of the position taken, in this respect, by counsel for defendant in error and by the learned Judge of the Court below.

That portion of the will, which is pertinent to the question presented for decision, provides: "The said trust shall continue in existence for the period of eleven (11) years after my death, *provided some one of my children herein named shall so long survive, otherwise the trust shall terminate upon the death of the last surviving of my said children.*"

The contingency was ever present that any one of the children might die before the expiration of eleven years; that one, or more, or all might die. The legacies themselves, as held by this Court in its previous decision, could not be taxed because they were *contingent* legacies, the contingency being ever present that the beneficiaries might die before the expiration of the eleven year trust period. If the corpus of the legacy could not be taxed because of its contingent nature, upon what theory can counsel for defendant in error contend, and the Court below maintain, that a tax should be imposed on the income to be derived from such contingent legacy *after* the time has expired for the contingency to happen? If the corpus of the legacy could not vest until after the repeal of the law, how could any income, to be derived from such corpus *after* eleven years had expired, be deemed vested and taxable previous to the repeal of the law, the contingency ever being present that one, or more, or all, of the beneficiaries might die before the expiration of the eleven years and they would get neither corpus nor income? It is one thing to subject to taxation the present "*value* of the *rights* to the *annual income*" for *eleven years,* which present right had vested previous to the repeal of the law on July 1, 1902; it is quite another thing to endeavor to subject to taxation, not only the present "*value* of the *rights* to receive the *annual income*" for *eleven years,* but also the "*value* of the *rights* to receive the annual income" *after* the eleven years have expired. In the first instance, the law deems the *present right* to receive the annual income for eleven years as having vested previous to the repeal of the law on July 1, 1902; in the latter instance, neither right to the corpus of the legacy nor to any annual income to be derived therefrom could vest until the eleven years had expired, which would be long after the repeal of the law on July 1, 1902.

While counsel for the defendant in error frankly concedes that a trust for eleven years is not a trust for life, he set up the fatuous and fallacious argument, in his reply brief in the Court below (and, we assume, will repeat that argument before this Court), that "by the terms of the will, the trust postponed possession and enjoyment of the *res* for a period of *eleven years,* so that that did not vest at the death of the legatee; but that as to the right to the enjoyment and possession of the income thereof that vested immediately and continued for the *life* of the legatee."

What counsel for the defendant in error concedes cannot be done *directly,* we submit should not be permitted to be done *indirectly.* If, as is admitted, a trust for eleven years is not a trust for life, then, obviously, the annual income from a trust of *eleven years* cannot be the equivalent of the annual income of a trust *for life.* Would counsel maintain the absurd and illogical proposition that the annual income from a trust for one year, or two years, or three years, or eleven years, is tantamount to the annual income from a trust for life? Is counsel for defendant in error not aware of the fact that the method of computing an annual income for a *term of years* is entirely different from computing the income to be derived from a trust *for life?* In the one case, the *age* of the legatee is all important; in the other case, that of an annuity, *it is immaterial,* the *sole question* being the *number of years.* In the case at bar the *number of years is eleven.* The methods of computation between the income of a *life estate* and of an annuity, *for eleven years,* are entirely different, as shown by the official mortuary tables, and the former bears a different and heavier burden of taxation than does the latter. This is recognized officially by the Commissioner of Internal Revenue, for, on the back of the "Legacy Return" (Plaintiff's Exhibit No. 3 on Retrial), will be found two separate sets of official mortuary tables, one to compute the *annual value* of a *life interest* of a person of *specified age,* and the other to compute the *annual value* for a *certain number of years.* (See, also, same mortuary tables officially promulgated in "Computation of Decisions," Plaintiff's Exhibit No. 2, Transcript of Record, p. 48.)

Although each of the six legacies, in the case at bar, amounted to the same sum, to-wit: $57,969.55, still, if they were treated as life estates or incomes for life, as held by the Court below, the taxes upon the income on each legacy, computed with the aid of mortuary tables, would vary according to the age of each beneficiary. (See testimony and computations of Frank H. Driscoll, Transcript of Record, pp. 53-55.) But, if treated as an annuity for eleven years, the income from each legacy of $57,969.55, computed with the aid of mortuary tables, would bear the same tax irrespective of the different ages of the beneficiaries.

The will of the decedent, John Rosenfeld, specifically limited the period of the trust to *eleven* years. The income thereof was to be paid to the beneficiaries *for a period of eleven years and no more.* The will in the case at bar did not purport to give any one of the six beneficiaries a life estate or income for life. In this respect, the will in the case at bar differs from the will involved in the case of *United States* vs. *Fidelity Trust Co.,* 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. ——. In that case, it was held that a legacy of property in trust to a trustee who was to pay the net income in periodical payments during the latter's *life* is not a contingent interest, but a vested interest *for life* as to *the income.*

How counsel for defendant in error can confound or confuse a *life estate or interest* with one for a *mere term of years* is inexplicable to us! How counsel can prolong or elongate a trust for *eleven years* to one for *life* is something quite incomprehensible to us! By what law, authority, reason, rule of logic, common sense, or mathematics, counsel can justify such a contention baffles even our ordinary comprehension! Upon what fiction of law, resurrected even from the antiquated and barbarous mazes of the common law, counsel for defendant in error can base the contention that an estate or income for eleven years is tantamount to an estate for life, arouses even our cupidity!

The previous decision of this Circuit Court of Appeals in this case does not bear out his contention, nor does a comparison of the wills involved in this case and in the case of *United States* vs. *Fidelity Trust Co., supra.*

The syllabus of the opinion of this Circuit Court of Appeals in this case completely refutes any such theory as that advanced by counsel for defendant in error, to the effect that a trust for *eleven years* is tantamount to a *life estate or interest.* It reads:

> "A legacy in trust to a trustee, who is to pay the net income to the legatee for a *term of years* until distribution, creates a vested interest in the beneficiary in such income *for the term,* which is assessable under War Revenue Act June 13, 1898, c. 448, Sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, Sec. 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, Sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), if it became vested before July 1, 1902, and amounted to $10,000.00."

We have italicized the words "term of years" and "for the term."

In the opinion of this Circuit Court of Appeals this language is used:

> "On principle we think there can be no distinction between the estate of the beneficiary of such income of a legacy *for life* and that of a beneficiary of such income for a *term of years,* and on the authority of the decision last

> cited we must hold that in the case of *Muenter* vs. *Union Trust Co.,* and the case of *Muenter* vs. *Rosenfeld,* the rights of the beneficiaries to receive the income of the legacies *were rights* which were *vested* at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the *annual income.*" (195 Fed. Rep. 480, *482.*)

The last two words used by the Circuit Court of Appeals, viz.: "annual income," refer to what? Ostensibly and undoubtedly to the annual income for *eleven years.* This Court of Appeals was considering whether the rights to receive the income of the legacies were *vested* prior to the repeal of the law on July 1, 1902. This Court held, as stated by it, that "the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacy, but upon the value of the rights to receive the *annual income.*"

We fail to see where counsel for defendant in error gets the slightest authority from the decision of this Circuit Court of Appeals in this case, justifying the position he now takes that a trust *for eleven years* is tantamount to a trust for *life;* or that a trust for a *mere period of years* and a *life estate* are practically convertible terms.

The legacy in gross was not subject to tax because it was not vested in possession and enjoyment previous to the repeal of the law, which took effect on July 1, 1902. This the Circuit Court of Appeals has so held. The only thing that could have been taxed previous to the repeal of the law on July 1, 1902, according to this Circuit Court of Appeals, was the "*value* of the *rights to receive the annual income.*" But this *annual income* could last only *eleven years.* It was not an annual income *for life.* And the contingency was ever present that some one, or more, or all, of the beneficiaries might die before the end of the eleven years.

The rights of the Government and of the tax-paying citizen must be determined as of the time when the repeal took effect, viz.: *on July 1, 1902,* and not as of today. On July 1, 1902, the decedent had been dead but 32 days. It appears that the Collector of Internal Revenue made no assessment or collection of taxes on the legacies involved in the case at bar until over a year afterwards, to-wit: *July 29, 1903.* But, as held by this Circuit Court of Appeals, the *right* to receive the annual income *vested* prior to the repeal of the law on July 1, 1902. This right vested at the time of the death of the decedent on May 28, 1902, 32 days before the repeal of the law took effect on July 1, 1902. *It was this right that was made subject to a tax.* It was a right to the *annual income for eleven years and no more.* It was not a right to any annual income *for life* or for any other period of time than *eleven years.* The official mortuary tables promulgated by the Commissioner of Internal Revenue make special provision for annuities of the character involved in the case at bar. The particular table applicable to the case at bar will be found printed on the back of the Legacy Return at the upper right hand corner of the outside page. (See also "Compilation of Decisions," "Exhibit No. 2-a.")

The witness Frank H. Driscoll, who testified and who has been connected as Internal Revenue officer with the Government for now nineteen years and a half and who has had special experience in regard to the assessment of taxes on legacies, stated that the interest or right to annual income subject to tax upon the legacies in question was considered by him as an *annuity* and so treated. He testified on cross-examination:

> "Q. Mr. Driscoll, you are basing your valuation of the interests passing to each of these legatees upon the assumption that they only get the income for eleven years. Is not that true?
>
> A. *It is an annuity, yes.*
>
> Q. *An annuity for eleven years?*
>
> A. Yes. (See Transcript of Record, p 49.)

On direct examination, he testified as follows:

> "Q. Mr. Driscoll, will you state to his Honor what would be *the value of the right to receive the annual income from this $57,969.55;* in other words, *what sum would you tax as a Government officer?*
>
> A. $20,313.62.
>
> Q. *That would be so as to each legacy?*
>
> A. *Yes; each of the six.*

Q. *And what is the rate of tax?*

A. *75/100 of 1%; 75c on each $100.*

The Court: Q. *The amount, you say, would be $20,313.62?*

A. *Yes, sir.*" (Transcript of Record, p. 49.)

It is respectfully submitted that the practice followed by an experienced officer of the Government in the matter of the assessment of taxes on legacies, while not conclusive upon questions of law, still is very persuasive as indicating the views of the law followed by such officer in the assessment of these taxes on legacies. In other words, the Internal Revenue officer, when called upon to assess, in the case at bar, a tax upon the "*value* of the *rights* to receive the *annual income*" treated such right as an annuity for *eleven years* and not as a *life estate or interest,* as is now contended by counsel for defendant in error.

The United States Supreme Court and other Federal Courts fully sustain us in the views we here advance.

The decision and reasoning in the leading case of *Vanderbilt* vs. *Eidman,* 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, is diametrically opposed to the views and judgment of the lower Court in this case.

In the Vanderbilt case, as in the case at bar, the beneficiary of the trust there created was to get the income for a certain period of time, to-wit: until he should attain a certain age (in the case at bar, after the expiration of eleven years), after which he was to come into possession of one-half of the estate. It was sought in that case, as in the case at bar, not only to tax the "*present right* to receive the income of such estate until he attains the age of thirty years," but to tax the income *after* he should have attained the age of thirty years, or, in effect, the income *for life.* The Supreme Court of the United States, in an elaborate opinion, held that not only could the corpus of the legacy not be taxed because of its contingent nature but that the income to be derived from such contingent legacy could not be taxed, "with the exception of his *present* right to receive the income *until* he attains the age of *thirty years.*" (See language of question III certified by the Circuit Court of Appeals to the Supreme Court of the United States, *Vanderbilt* vs. *Eidman,* 196 U. S. 48 O, ——, 49 L. Ed. 563, *565.*)

In other words, the Supreme Court of the United States held, in the Vanderbilt case, that nothing could be taxed after the repeal of the War Revenue Act, which took effect on July 1, 1902, "with the exception of his *present right* to receive the income of such estate *until* he attains the age of *thirty years.*"

Applying that decision to the case at bar, we respectfully submit that nothing could be taxed against any of the beneficiaries under the trust created by the will of John Rosenfeld, "with the exception of their *present rights* to receive the income of such estate *until* the expiration of eleven years." (Paraphrasing the language of United States Supreme Court in the Vanderbilt case.)

The facts of the Vanderbilt case, as set forth in the statement of the case by Mr. Chief Justice White, show the direct applicability of that decision to the case at bar:

After setting forth that portion of the will creating the trusts, the learned Chief Justice stated:

> "All of the children of Cornelius Vanderbilt, named in the seventeenth clause of his will, were living at the time this suit was brought. At the time of the death of Cornelius Vanderbilt his son Alfred G. Vanderbilt was between *twenty-two and twenty-three years of age,* and his son Reginald C. Vanderbilt was between nineteen and twenty years of age, and both were unmarried.
>
> The appraised value of the residuary personal estate at the time of the testator's death was $18,972,117.46.
>
> The right of Alfred G. Vanderbilt to the beneficial enjoyment, as provided in the will until he became *thirty years of age,* was appraised at $5,119,612.43, and upon this sum the executors paid a death duty under Secs. 29 and 30 of the Act of June 13, 1898 (30 Stat. at L. 464, Chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), at the rate of 2½%, the tax amounting to $115,191.28. After payment of this amount, and subsequently to the passage, on March 2, 1901 (31 Stat. at L. 946, Chap. 806, U. S. Comp. Stat. 1901, p. 2307), of an amendment to the War Revenue Act of 1898, the Commissioner of Internal Revenue, considering

that by that amendment Alfred G. Vanderbilt had become *immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of thirty and thirty-five years respectively,* assessed a death duty based upon that hypothesis. In making this assessment, *as by the mortality tables it was shown that Alfred G. Vanderbilt had a life expectancy beyond the ages of thirty and thirty-five years,* the commissioner assessed *the interest as a vested estate equal in value to the sum of the entire residuary estate; viz.: $18,972,117.46.* Upon this valuation a tax was levied of 2½ per cent, producing $426,872.64. On this amount, however, credit was allowed for the sum of the tax previously paid, leaving the balance due $311,681.36. On September 3, 1901, this balance was paid by the executors under protest, 'and upon compulsion of the collector's threat of distraint and sale.' The executors thereupon made the statutory application to the commissioner of internal revenue for the refunding of the amount, and, it being refused, commenced in the Circuit Court of the United States for the Southern District of New York this action to recover the payment.

The facts, as above stated, were averred and the right to recover was based upon the ground that *as Alfred G. Vanderbilt only had the enjoyment presently of the revenues of the residuary estates up to the period when he might attain the age of thirty years, he was only liable to be assessed upon that beneficial interest. For this reason it was charged that the assessment made of the bequest of Alfred G. Vanderbilt of the whole residuary estate, upon condition that he reached the ages of thirty and thirty-five years respectively, was unwarranted.*

The Circuit Court, on the ground that the complaint did not state a cause of action, sustained a demurrer to that effect filed by the Government, and dismissed the action. 121 Fed. 590. The Circuit Court of Appeals stated the facts as above recited, and certified certain questions."

The question certified by the Circuit Court of Appeals in the Vanderbilt case, and upon which the Supreme Court based its decision, was as follows:

> "III. Did Secs. 29 and 30 of said Act authorize the assessment and collection of a tax with respect to *any* of the *rights* or *interests* of Alfred G. Vanderbilt as a *residuary legatee* of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, *with the exception of his present right to receive the income of such estate until he attains the age of thirty years,* prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?" (Italics ours.)

This question was answered in the negative. In other words, the Supreme Court held that no taxes "with respect to *any* of the *rights* or *interests* of Alfred G. Vanderbilt as a *residuary legatee,* could be imposed or assessed *with the exception of his present right to receive the income of such estate until he attains the age of thirty years.*" (See language of question certified No. III as above quoted.)

The Supreme Court decided that the reversionary interests could not be taxed because they were contingent upon the beneficiary being alive at the expiration of the respective periods of the trusts, to-wit: the ages of thirty and thirty-five years respectively; and it held, further, that not *any* of the *rights* or *interests* of the beneficiary, to-wit: the rights to receive the *annual income* to be derived from the trust estate *after* the beneficiary had attained the ages of thirty and thirty-five respectively, could be taxed, and it laid down the rule that the *only right or interest* that could be taxed was "*his present right to receive the income of such estate until he attains the age of thirty years,*" and that the income to be derived from the estate between the ages of thirty and thirty-five, at which latter period he was to get the balance of said estate, could *not be taxed.* The Supreme Court did not hold, in the Vanderbilt case, that the "*present right to receive the income of said estate,*" extends to or was prolonged beyond the period of the trusts, and was, in effect, a "*present right to receive the income of such estate*" *for life,* simply because (to use the language of the trial Judge in his opinion, Transcript of Record, p. 60) "the vested interests of each (beneficiary) was to the income for life, *since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives.*"

The reasoning and decision in the Vanderbilt case completely supports the contention made by us in the Court below and now advanced upon this writ of error.

If the right to receive the annual income for *eleven years* is the equivalent of the right to receive it *for life,* as was held by the learned Judge of the Court below, why did not the United States Supreme Court, in the Vanderbilt case, hold that not only was the "*present right* to receive the income of such estate *until* he attains the age of *thirty years" taxable,* but also the right to receive the income *thereafter or for life,* inasmuch as Alfred G. Vanderbilt was, according to the terms of the will in that case, as in the case at bar, to inherit the rest of the estate?

Why did not the United States Supreme Court, in the Vanderbilt case, treat the *present right* to income *for years* as the equivalent of the *present right* to income *for life,* as did the trial Court in the case at bar, if it be the law that the *present right* to receive an income for a *few years* is the equivalent of the *present right* to receive an income *for life?*

In the Vanderbilt case, as in the case at bar, the will provided that at the expiration of the several periods of trusts, the beneficiary should come into actual possession and enjoyment of his legacy, which is the only reason given by the learned Judge of the Court below for holding that an estate for *eleven years* is the equivalent for the estate *for life,* for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented.

In the Vanderbilt case, the beneficiary Alfred G. Vanderbilt was to get the income *until* he arrived at the age of *thirty years,* when he was to be put in full possession of one-half the portion of the estate left to him, and thereafter he was to receive the income from the other half of the estate *until* he attained the age of *thirty-five years,* and yet the Supreme Court of the United States held that the income from the second half of the estate to be paid Alfred G. Vanderbilt *after* attaining the age of *thirty years* and *until* he should attain the age of *thirty-five years* was *not subject to taxation,* which is directly contrary to the rationale of the decision of the lower Court in this case. The Supreme Court held that the only interest that was subject to taxation, previous to the repeal of the law on July 1, 1902, was the "*present* right to receive the income of such estate *until* he attains the age of *thirty years.*

This is precisely what we contend in the case at bar. We contend that the only interest or right subject to taxation, in the case at bar, if any interest was taxable at all, was the *present right* to receive the *annual income* for *eleven years;* that, and no more.

This view of law, as declared in the Vanderbilt case, was expressly recognized in the subsequent case of *United States* vs. *Fidelity Trust Company,* 222 U. S. 158, where the United States Supreme Court said:

> "*Vanderbilt* vs. *Eidman,* 196 U. S. 480, 49 L. Ed. 563, 25 Sup. Ct. Rep. 331, concerned a life estate in remainder, which, whether the remainder was technically vested or contingent

> (*Ibid.* 501, 502), was not vested in possession or enjoyment. *It was assumed that the tax was payable in a case like this. Ib. 488, 495.*"

The case of *United States* vs. *Fidelity Trust Company* involved an estate *for life*, not a trust for merely *eleven years*, which differentiates it from the case at bar as to the facts, and it was properly held in that case, following the reasoning in the Vanderbilt case, that the *present right* to receive the quarterly yearly income having attached or vested a considerable time previous to the repeal of the law on July 1, 1902, the income *for life* was taxable, to be computed with the aid of the official mortuary tables.

The Vanderbilt case did not involve a *life estate* or *income for life* but, as in the case at bar, an estate or income *for years.* Alfred G. Vanderbilt was to receive the annual income upon one-half of the trust estate willed him until he should attain the age of *thirty years,* at which time he would receive one-half of the estate, and thereafter the annual income upon the other half of the trust estate *until* he should attain the age of *thirty-five* years, when he would receive the other half and balance of the estate. As above stated, the Supreme Court held that his interest, for the purposes of taxation, was not an estate *for life* or *income for life* (as was erroneously held by the trial Court in the case at bar), but was the *present right to receive the income of such estate during the period of the trust, and no longer.*

According to the Vanderbilt case, as recognized and followed in the later case of *United States* vs. *Fidelity Trust Company,* both of which cases are directly applicable, as to the law, to the case at bar, the *only* taxable interest in the case at bar, if there be any taxable interest at all, was the *present right* to receive the *annual income* for *eleven years,* and no longer, said interest to be computed with the aid of the official mortuary tables.

There was the ever present contingency in the case at bar, as in the Vanderbilt case, that the beneficiaries might die before the trust periods had expired, which feature of the case seems to have been entirely ignored by the learned Judge of the Court below.

As already stated, the rights of the taxing power and of the tax-paying citizen are to be determined and fixed as of the date when the repeal of the War Revenue Act took effect, to-wit: on July 1, 1902, and not as of a later date, or as of the present time. After July 1, 1902, no further taxes could be imposed or assessed under the War Revenue Act of June 13, 1898, as amended and supplemented. No taxes could be collected after July 1, 1902, except those that came clearly within the saving clause of the Repealing Act and those that did not come within the scope of the Refunding Act of June 27, 1902. At the time that the repeal took effect, on July 1, 1902, the only right or interest of the beneficiaries, in the case at bar, which was subject to taxation, if any interest at all was subject to taxation, was the *present right* to receive the *annual income* from the trust estate for the period of *eleven years,* the clear value of which right or interest was to be ascertained by computation with the aid of the official mortuary tables.

The case of *Herold* vs. *Shanley,* 146 Fed. 20, also strongly supports the views we here advance. That was a decision by the Circuit Court of Appeals for the Third Circuit. The syllabus succinctly states the facts of that case and the doctrine we here invoke, as follows:

> "Testator bequeathed $100,000 to his executor in trust to pay the income for the support and education of testator's grandson until he should arrive at the age of twenty-one years, when the sum was to be paid to such grandson, etc. *Held,* that such legacy was not vested prior to the grandson's arrival at age, and hence the only portion thereof which in the meantime was taxable under War Revenue Act, June 13, 1898, c. 448, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, 31 Stat. 948 (U. S. Comp. St. 1901, pp. 2307, 2308), and Act June 27, 1902, c. 1160, 32 Stat. 406 (U. S. Comp. St. Supp. 1905, p. 449), was the amount he would *probably receive before reaching majority.*"

A reading of the instructive opinion of the Circuit Court of Appeals for the Third Circuit will disclose that it took the same view of the decision of the Supreme Court of the United States in the case of *Vanderbilt* vs. *Eidman, supra,* as to the non-taxability of the income from any interests *after* the expiration of the trusts, which we here maintain.

In that case, as in the case at bar, a trust was created for a temporary period and the income was to be paid to the beneficiary for a limited time, to-wit: until the grandson should reach his majority (in the case at bar, for eleven years), at which time he was to receive the legacy for life (in the case at bar, at the expiration of eleven years the beneficiaries were to receive their legacies for life). The same contention was made in that case as is here advocated by counsel for defendant in error. But the Circuit Court of Appeals for the Third Circuit held that the only taxable interest was that portion of the income which the grandson would *probably receive before reaching majority,* said income to be computed with the aid of the official mortuary tables.

Other decisions, to the same general effect, are:

Ward vs. *Sage,* 185 Fed. 7;
Disston vs. *McLain,* 147 Fed. 114;
Lynch vs. *Union Trust Co.,* 164 Fed. 161.

In view of the above authorities, we respectfully submit that the reasons given by the Court below, and now sought to be upheld by counsel for defendant in error, imposing a legacy tax upon an annual income for *eleven years* just as if the annual income were *for life,* are not sound and cannot be supported in law, and that the judgment of the lower Court, in that respect, must be reversed.

A consideration of the provisions of the Refunding Act of June 27, 1902 (32 Stats. L. 406), as applied to the case at bar, clearly exposes the fallacy of the contention made by counsel for defendant in error and of the reasoning of the Court below in this connection.

The present suit is specially authorized by the provisions of Section 3 of the Act of June 27, 1902 (32 Stats. L. 406), which authorizes a recovery on "*so much of said tax* as may have been collected on *contingent beneficial interests* which shall not have become vested prior to July 1, 1902."

The present suit is brought to recover "*so much of said tax* as may have been collected on *contingent beneficial interests*" in the Rosenfeld estate.

"So much of said tax" on said contingent beneficial interests, which it is the purpose and object of the complaint as amended to recover, aggregates the sum of $2998.80, not including accrued interest and costs.

Counsel for defendant in error seems to confuse and confound this suit, which is brought to recover "*so much of said tax* as may have been collected on contingent beneficial interests" in the Rosenfeld estate, with what he is pleased to term an over-valuation. There is no question of over-valuation in the case at bar. The only purpose of this suit is to recover, "*so much of said tax* as may have been collected on contingent beneficial *interests*" in the Rosenfeld estate (using the language of the Refunding Act of June 27, 1902).

"So much of said tax" is represented by the difference between the sum of $652.15 (the tax actually levied on the contingent beneficial interests in the Rosenfeld estate, by the then Collector of Internal Revenue) and the sum of $152.35 (the tax which the Collector of Internal Revenue should have assessed on the clear "value of the rights to receive the annual income" derived from the contingent beneficial interests in the Rosenfeld estate, as previously held by this Court). This difference between $652.15 and $152.35 amounts to the sum of $499.80 on each legacy. There were six legacies or contingent beneficial interests in the Rosenfeld estate, which taxed at $499.80 each would aggregate the total sum of $2,998.80, the amount sued for under the complaint as amended.

It is thus seen, from these figures, which are of record and were testified to by the Government expert, Frank H. Driscoll, an Internal Revenue officer of long experience with the Government in the collection of war legacy taxes, that the object and sole purpose of the complaint as amended is to recover *"so much of said tax* as may have been collected on contingent beneficial interests" in the Rosenfeld estate.

There is no question of any over-valuation in the case at all and to import such an argument into the case is to inject a false issue. The Collector of Internal Revenue valued and assessed the six contingent beneficial interests at $57,969.55. No one complains about that valuation and that remains the valuation of the six contingent beneficial interests to this day, and is the sum, upon which the Circuit Court of Appeals has held that the "value of the rights to receive the annual income (from said sum of $57,969.55) as determined in *United States* vs. *Fidelity Trust Co.,*" "with the aid of mortuary tables," is to be assessed and collected.

This is not a case of over-valuation, as is ingeniously suggested by counsel for defendant in error, but it is simply and nothing more than a mere computation as to what tax the Collector of Internal Revenue should have assessed and collected on the clear "value of the rights to receive the annual income" from each contingent beneficial interest in the Rosenfeld case, which contingent beneficial interest was assessed by said Collector at $57,969.55 and was and is the sole and only basis upon which to compute the "value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co.,*" "with the aid of mortuary tables" from each of said contingent beneficial interests assessed by the then Collector at $57,969.55.

As a matter of fact, the Collector of Internal Revenue has never at any time made any assessment whatever, under the rule announced by the Circuit Court of Appeals to this Circuit, of the "value of the rights to receive the annual income" from such contingent beneficial interest of $57,969.55. How, then, can there be any question of over-valuation? Even if there were, it could not affect the right of plaintiff in error to recover "*so much of said tax* as may have been collected on contingent beneficial interests" under the Refunding Act of June 27, 1902.

Using the mortuary tables, as officially contained in "Compilation of Decisions" rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898, Edition of January, 1899, pp 195 to 199 (also see the same tables printed on the back of the "Legacy Return," Plaintiff's Exhibit No. 3 on Retrial), we find that the "value of the rights to receive the annual income" from the sum of $57,969.55, assuming money at 4 per cent in accordance with the official mortuary tables, for a period of eleven years, would amount to $20,313.62 each. In other words, the six contingent beneficial interests of $57,969.55 would produce, according to the mortuary tables, annual incomes during eleven years aggregating $20,313.62 each. It is, therefore, this latter sum, *representing the value of the annual income for the period of eleven years,* that the Collector of Internal Revenue should have assessed and collected a tax on assuming he had a right to impose or collect any tax whatsoever. The tax on this annual income, as computed by the Government officer in accordance with the war tax rates, amounts to the sum of $152.35 as to each one of the six beneficiaries. It is this sum that represents the "value of the rights to receive the annual income" derived from the sum of $57,969.55, computed according to the official mortuary tables. The difference between the tax of $152.35, which, under the previous decision of this Court in this case, it was held the defendant in error should retain, and the tax of $652.15, which we were compelled to pay on the contingent beneficial interests, represents, obviously, "*so much of said tax*" as was collected on contingent beneficial interests in the Rosenfeld estate. This difference between $652.15 and $152.35 amounts to $499.80 as to each one of the six legacies, all of them aggregating the total sum of $2,998.80, the amount sued for under the complaint as amended.

Having made it clear that the sole and only purpose of the amended complaint is to recover "*so much of said tax*" as was collected on the six contingent beneficial interests in the Rosenfeld estate, it follows that the case comes squarely within the ruling of the Honorable Attorney General. (See Opinions of Attorney General, Vol. 26, p. 194, *197, 198*), in which he held that actions for the recovery of taxes under the "Refunding Act" of June 27, 1902, were of a special character and that claims to refund legacy taxes were not governed or subject to the provisions of Section 3226, 3227, 3228 of the Revised Statutes, requiring the presentation of claims, etc.

The case of *Thacher* vs. *United States,* 149 Fed. 902, is also directly in point and in consonance with the ruling of the Attorney General.

The learned Judge of the Court below, in holding that this was not a case of overvaluation nor a case governed or subject to the provisions of Section 3226 *et seq.* of the Revised Statutes, requiring presentation of claims etc., used the following language:

> "The defendant strenuously contends that the theory upon which plaintiffs have proceeded is erroneous; that, under the decision of the Circuit Court of Appeals, that section furnishes no basis for recovery; that the Court, having held that, to the extent of the annual income, the rights given plaintiffs under the will were vested rights, it results that the tax collected must be regarded as one involving a mere overvaluation of such vested interests, and that the right of the plaintiffs to recover, if at all, is governed by the provisions of Sections 3226, 3227 and 3228 of the Revised Statutes, to the requirements of which the plaintiffs' proofs have not conformed.
>
> But I am of opinion that this contention involves a misapprehension of the remedial scope of Section 3 and a failure to fully appreciate what the Refunding Act was intended to accomplish. Its evident purpose was, as an act of justice by the Government, to provide a means to restore to the citizens moneys to which the Government was not entitled, but which he had been required to pay, by reason of a misconstruction by the revenue officers of the provisions of the War Revenue Act, and as to the recovery of which the existing statutes afforded no adequate remedy; and that it was intended to cover all instances where, as a result of the administration of that Act, taxes had been to any extent illegally or unjustly assessed and collected is, I think, from its comprehensive language, quite obvious. By its very terms it contemplates that the tax may have been to

some extent properly assessed, as being based upon a vested interest, and hence the provision that only to the extent that it exceeds such basis shall it be refunded; that is, '*so much* of said tax as may have been collected on contingent, beneficial interests which shall not have become vested.' The present case falls clearly within the scope of the Act. It matters not whether we say the assessment was erroneous because an over-valuation of vested interests, or because one made wholly upon interests which had not vested. Either is within the wrong Congress intended to redress, and both are equally within the remedial provision of the statute. Nor does the decision of the Circuit Court of Appeals operate to take the case out of the provisions of this Act. That Court clearly indicates by its opinion that, while the tax as assessed was in part based upon vested rights subject to the Revenue Act, it covered interests which were not so vested, and that, as to such excess, plaintiffs should be entitled in this action to recover.

This construction is in harmony with that of the Department of Justice. In his opinion rendered to the Secretary of the Treasury for his guidance as to the scope and purpose of the Act of June 27, 1902, the learned Attorney General says:

> 'The provisions of the Act are special, and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S. Sec. 3228.) Suits brought to recover money due under this Act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The Act by its terms, creates

and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (*U. S.* vs. *Wardell,* 172 U. S. 48.)

'It will be observed that under the provisions of this statute Congress has granted a right of repayment regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial.'

—Op. Atty. Genl. Vol. 26, p. 194.

See also

Thatcher vs. *U. S.,* 149 Fed. 902."

(See Transcript of Record, pp. 57-60.)

Furthermore, the action of the then Collector of Internal Revenue, in imposing, assessing and collecting "so much of said tax" on each one of the six contingent legacies left to the six beneficiaries under the trust created by the last will and testament of John Rosenfeld, deceased, was in violation of the last paragraph of Section 3 of the Act of

June 27, 1902, which forbids the assessment or imposition, after the passage of the Act, "upon or in respect of any *contingent beneficial interests* which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

The imposition of the tax of $499.80 on each one of the six legacies by the then Collector of Internal Revenue was directly contrary to this inhibition of the statute. The statute was enacted on *June 27, 1902,* and the taxes in the case at bar were assessed, imposed and collected by the then Collector of Internal Revenue on *July 29, 1903,* or *more than one year* after the passage of the Act of June 27, 1902.

As was well said by Judge Morrow, in the case of *Union Trust Co.* vs. *Lynch,* 148 Fed. 49, 54:

> "The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence one year and four days, and this statute says specifically that when it is not vested at the time the repealing statute went into effect *no tax shall be collected;* that is, then the specific command of this statute is that unless a person receives a legacy of more than $10,000.00 which vests in the absolute possession and enjoyment of such person *prior* to the passing of this repealing act, *there can be no tax.* That is a *specific, direct, positive, unqualified direction* of the statute, which the Court *cannot evade.*"

In that case, it was held that where the legatees of a testator were to receive only the income from their respective shares in the estate until they reached *stated ages,* which did not occur in any case until *after* July 1, 1902, when the repeal of the War Revenue Act took effect, the interest of such legacies for the purpose of taxation was the value of the income received by each respectively from the estate *prior* to said July 1, 1902, providing said income amounted to more than $10,000.00.

This decision was affirmed by the Circuit Court of Appeals for this Circuit, District Judge Van Fleet delivering the opinion of this Court.

> See *Lynch* vs. *Union Trust Co. of S. F.,* 164 Fed. 161.

For all of the reasons hereinabove urged, we respectfully submit that, both upon reason and authority, the learned Judge of the Court below was in error in holding that the annual income to be derived from an estate for *eleven years* should be taxed, under the War Revenue Act of 1898, as amended and supplemented, upon the basis that such annual income was, in effect, an annual income *for life;* and urge that the judgment of the Court below, in this respect, be reversed, with directions to said Court to enter judgment in favor of plaintiff in error for the full sum of $2,998.80 with interest and costs, as prayed in the amended complaint.

In closing, we may be pardoned for again reminding this Court that in cases of doubt (although we have no doubt of the correctness of our position), the tax should be resolved in favor of the tax-payer, and that the view and practice of the Internal Revenue official, who testified in the case at bar and computed the tax on the basis of *eleven years* and not *for life,* is persuasive and entitled to serious consideration.

It is respectfully submitted that the decision of the lower Court, in awarding the plaintiff in error the sum of $1,432.19 with interest and costs, instead of the sum of $2,998.80 with interest and costs, should be reversed and that this Court, upon the pleadings and record now before it, should direct the Court below to enter judgment in favor of plaintiff in error in the sum of $2,998.80 with interest and costs.

Respectfully submitted,

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